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No. 215

In the Supreme Court of the United States

OCTOBER TERM, 1960.

PETER JOSEPH, also known as PETE JOSEPH,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not yet reported. The opinion of Judge Lord, in the district court, denying the motion to suppress evidence (R. 69-79), is reported at 174 F. Supp. 539. The opinion of Judge Welsh, before whom the case was tried without a jury (R. 221-225), is not reported.

JURISDICTION

The judgments of the court of appeals were entered on May 16, 1960. Petitioner's motion for a rehearing was denied on June 6, 1960 (Pet. 5a). The petition for a writ of certiorari was filed on July 6, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the search warrant was supported by a sufficient affidavit.

2. Whether there was compliance with the requirement of Rule 41(c), F. R. Crim. P., that search warrants be served in the daytime.

3. Whether the search was properly conducted.

4. Whether evidence obtained through informants, as authorized by Congress, should be ordered excluded by this Court in the exercise of its rule-making power.

5. Whether the federal tax on wagering is constitutional.

STATUTES AND RULE INVOLVED

1. 26 U.S.C. 4401 provides:

> (a) *Wagers.*
>
> There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.
>
> (b) *Amount of wager.*
>
> In determining the amount of any wager for the purposes of this subchapter, all charges in-

cident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary or his delegate, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(c) *Persons liable for tax.*

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place of residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him.

2. 26 U.S.C. 4412(a) provides:

Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

3. 26 U.S.C. 7623 provides:

The Secretary or his delegate, under regulations prescribed by the Secretary or his delegate, is authorized to pay such sums, not exceeding in the aggregate the sum appropriated therefor, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law.

4. Rule 41, F. R. Crim. P., provides in pertinent part:

(c) *Issuance and Contents:* A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be

served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

* * * * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. * * *

STATEMENT

Petitioner was charged, under an information consisting of two counts, with failure to pay the special occupational tax on receiving wagers[1] and, under a second information consisting of thirty counts, with willful failure to file an excise tax return on wagers[2] in each of thirty months covering a period from January, 1956, to June, 1958 (R. 10-13). After waiving a jury, petitioner was tried before the court in

[1] See 26 U.S.C. 4412.

[2] See 26 U.S.C. 4401.

the Eastern District of Pennsylvania and was found guilty on all counts (R. 221-225). He was sentenced to pay a fine of $1,000 on both counts of the first information, or a total of $2,000 (R. 226). On each of three counts of the second information petitioner was sentenced to pay a fine of $1,000, or a total of $3,000, and to concurrent terms of imprisonment for thirty days, with execution suspended. Sentence was suspended on the remaining counts of this information (R. 227). The court of appeals affirmed (Pet. App. 1a-2a).

Prior to the trial, petitioner moved to suppress as evidence the fruits of a search of his property at 209 Minersville Street in Pottsville, Pennsylvania, made on June 21, 1958 (R. 14).[1] At the hearing on the motion to suppress before Judge Lord and at the trial before Judge Welsh, sitting without a jury, the following facts appeared:

1. On June 19, 1958, at about 9:30 or 10:00 a.m., Mahlon H. Lauer went to the office of the Intelligence Division of the Treasury Department at Camden, New Jersey, and talked with Special Agent Chiovero. Lauer wanted to be paid for information he could

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[1] Actually, there were two search warrants covering two places of business, also used for residential purposes, in Pottsville, but it was understood that the same considerations applied to both (R. 70). 209 Minersville Street (or 209 Court Street or Terrace, the two streets being continuations of each other) was a small store, behind and above which were rooms used for gambling and for residential purposes. It was owned and operated by petitioner. 523 Minersville Street was a similar establishment operated by Lauer, the informant, under the supervision of petitioner.

give relating to petitioner's gambling activities in Pottsville (R. 35, 56-57, 157). Lauer had worked for petitioner and had received some gambling records from him, with instructions to destroy them, on a recent occasion when it had been rumored that internal revenue agents were going to be in town. Lauer had burned part of them, but had retained some numbers slips and a ledger book kept by petitioner, which he showed to Agent Chiovero (R. 109-113).

With Lauer's permission, Chiovero took the records to be inspected by the chief of the Intelligence Division in Philadelphia. It developed that several of the agents knew that petitioner was reputed to be engaged in gambling. The files showed that petitioner had admitted that he was a gambler when he was under prosecution in 1952 for income tax evasion. The address given by Lauer as the home and place of business of petitioner was also checked and found to correspond with that given on petitioner's income tax return. Two agents were assigned to observe whether there was activity at the two addresses where petitioner was said to be operating (R. 57-59). Chiovero testified that the purpose of this investigation was to determine whether the information offered by Lauer was reliable (R. 60).

Chiovero returned to Camden and took Lauer's affidavit (R. 22). Lauer stated in the affidavit that he had been employed in the numbers business by petitioner at the two addresses in question from January to May, 1958; that he had submitted to the agents a ledger book containing a record of peti-

tioner's numbers business during 1956 and 1957, in which he had seen petitioner make entries, and a quantity of numbers slips; that these had been turned over to him by petitioner for the purpose of being destroyed (R. 54-55).

The affidavit stated on the printed form that the statement was made freely and voluntarily, without any threats or rewards, or promises of reward having been made in return therefor (R. 55). Lauer testified that he was not promised anything in return for his statement, but he did it with the thought that he was going to receive a reward; he would not have gone to Pottsville in the first place and gone through all this trouble if there had been no hope of reward (R. 156-157). He stated that he received $1,000 in July (R. 149). Special Agent Morris testified that it was understood that Lauer was to be paid for his information at the time he made his affidavit, although the amount was not then agreed upon; that Lauer received $100 on June 23, in accordance with this agreement, and $900 on July 25 (R. 164-176).

The following day, June 20, having received information through his superior that the two agents had reported activity at the two addresses, Agent Chiovero applied for search warrants. He gave in support his affidavit that he had reason to believe that on the premises named there were concealed betting slips, run down sheets, records and other paraphernalia and equipment used and intended for use in violation of the statutes relating to gambling; that his reason for so believing was that on June

19, 1958, a confidential informant, believed by him to be reliable, had informed him that he had seen petitioner take numbers bets and had identified records of such transactions kept by petitioner; that investigation showed that petitioner had not complied with the law requiring registration, filing of returns and payment of the occupational tax on persons engaged in the business of accepting wagers (R. 6-7).

2. The search warrant for 209 Court Terrace was served on June 21, at about 4:00 p.m. (R. 16, 21). Eight officers, approximately five of whom were armed with revolvers, conducted the search (R. 17). Several persons were working on numbers slips when the officers entered (R. 194). No one was permitted to leave the premises, although no one was placed under arrest (R. 26, 45, 50). About 7:00 p.m., petitioner entered and about an hour afterward had an attorney present, who was permitted to come in for the purpose of consulting with petitioner as to whether to consent to the opening of a safe found in a compartment in an upstairs closet (R. 32-34, 31, 44, 65). After the officers had threatened to open the safe with a crowbar, if necessary, the attorney and petitioner agreed to open it (R. 49, 65). Approximately $5,500 was found therein (R. 44). In addition, approximately $3,500 was found in two cigar boxes in the same closet (R. 48). The money, various items of gambling paraphernalia, and records of gambling transactions were inventoried and seized, the search ending at a time variously estimated between 9:30 p.m. and 10:45 p.m. (R. 26, 33).

ARGUMENT

1. There was a substantial basis for crediting the hearsay upon which the search warrant was issued. Lauer, the person furnishing the information on which the Treasury agent's affidavit was based, also presented documentary records of numbers transactions; and these were of such a character that they could scarcely have been fabricated. The fact that petitioner was supposed to be engaged in gambling was already known to several agents, named in the record; also, the records at the central office of the Intelligence Division of the Treasury Department at Philadelphia showed that petitioner had admitted he was engaged in gambling in 1952, when he was under prosecution for income tax evasion. The address given by the informant as the residence and place of business of petitioner was verified by reference to his previously filed income tax returns, and it was observed (through surveillance) that a number of people were visiting the two addresses given by the informant.

These factors, separately and together, justified the agent's affidavit that he believed the informant to be reliable. Such a belief does not necessarily have to be grounded on the fact that the person furnishing the information has previously given information which was found reliable. It is enough that the informant's statement be reasonably corroborated by other matters within the officer's knowledge. *Draper* v. *United States*, 358 U.S. 307. In *Jones* v. *United States*, 362 U.S. 257, the Court rejected the conten-

tion that all the information available to the officer making the affidavit which led him to credit the informant be presented to the magistrate, saying (at page 272):

> * * * We have decided that, as hearsay alone does not render an affidavit insufficient, the Commissioner need not have required the informants or their affidavits to be produced, or that Didone [the officer] have personally made inquiries about the apartment, so long as there was a substantial basis for crediting the hearsay.

While all of the facts known to Agent Chiovero in this case were not included in his affidavit, he did set forth that the informant had presented for inspection records of gambling transactions kept by petitioner, which in itself constituted sufficient substantial corroboration of the hearsay information given by the informant.

Neither the informant's general character nor the propriety of his conduct in this transaction is determinative of his reliability as an informant. As was pointed out by Agent Chiovero, on cross examination, the internal revenue office was not interested in the general reliability of Lauer as an individual, but only in the reliability of the particular information he was supplying (R. 60). The agents checked on this information and, with good reason, found it credible.

2. The warrant which was served at approximately 4:00 p.m., was served in the daytime, as required by Rule 41, F. R. Crim. P., *supra*, pp. 4-5. The search was completed, according to the latest estimate, at around 10:45 p.m. On June 21, 1958,

the hour of sunset at Philadelphia, which is in the near vicinity of the premises searched, was 8:33 p.m., Eastern Daylight Time.[1] Inasmuch as darkness is not immediate after sunset, it is apparent that only a comparatively small part of the search took place during the nighttime. As pointed out *infra*, there is no showing that the search was unreasonably prolonged. Moreover, the hour at which the warrant is served is controlling under the Rule. *United States* v. *Bell*, 126 F. Supp. 612, 617 (D. D.C.); *United States* v. *Liebrich*, 55 F. 2d 311 (M.D. Pa.).

3. The search was properly executed. The officers were armed, as is customary, not because violence actually took place or was threatened, but to forestall any violence or the threat thereof. The temporary restriction on the movement of the individuals on the premises was reasonable, in view of the fact that some of them were apparently engaged in numbers transactions when the officers arrived. The coming or going of people could have frustrated the purpose of the search. In any event, such a restriction on ingress or egress does not go to the validity of the search.

There is no showing that the search was unreasonably protracted. There were three floors to be covered, devoted to both business and residential purposes. The difficulty of the search is illustrated by the delay encountered in discovering the safe, which was hidden away in a false floor or compartment in

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[1] June 21st is next to the longest, if not the longest, day of the year.

an upstairs closet, not found until the latter part of the search.

The money in the safe and in the cigar boxes in the closet was properly seized as an instrumentality used or intended to be used in the gambling operation. *United States* v. *Leveson*, 262 F. 2d 659 (C.A. 5); *United States* v. *$4,298.80*, 179 F. Supp. 251 (D. Md.); *United States* v. *$2,223.40*, 157 F. Supp. 300 (N.D. N.Y.). The use of money as a functional integral part of a gambling operation renders it contraband. *United States* v. *$1,508.46*, 158 F. Supp. 916 (S.D. Ill.).

4. The records of petitioner's gambling transactions, turned over by the informant, were properly used. Congress has authorized payment for information by 26 U.S.C. 7623 (*supra*, p. 4), a statute going back to 1867. The question of the propriety of accepting such evidence has been disposed of by Congress, and is therefore beyond the proper scope of the Court's rule-making power. Cf. *Palermo* v. *United States*, 360 U.S. 343.

The records here involved were not stolen, as claimed by petitioner. Rather, the intention of petitioner clearly was to abandon them. Cf. *Hester* v. *United States*, 265 U.S. 57. The informant, instead of carrying out his instructions to destroy, turned them over to the Treasury authorities. Whatever may be thought of the personal ethical standards of Lauer as an individual, we do not believe that it was improper, particularly in view of 26 U.S.C. 7623, for the government to accept the records which were intended by petitioner to be withheld from it. There

is no implied condition in the Congressional enactment that information revealed by an employee or colleague of an offender may not be accepted. The possibility of false accusation is the real hazard to be guarded against in using evidence provided by an informant. Here, even though the evidence was in the form of documentary records, the agents carefully checked before they used the information.

5. The constitutionality of the taxing statute is not an open question, in view of *United States* v. *Kahriger*, 345 U.S. 22.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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